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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1278

CAROL MUSIC, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

REPLY BRIEF FOR PETITIONER

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Respondent asks that certiorari be denied on the theory that the question below was merely a narrow factual psychiatric issue as to a particular lawyer's mental health, which this Court, of course, would have no interest in reviewing.

The reply to this contention is two-fold.

First, the issue here is not a psychiatric but a legal question: whether even the majority decision in *Link* applies where the errors of counsel were

> "so bizarre and persistent as *plainly to indicate* to any court or clerk of court that they were due to illness, mental confusion *or other factors preventing normal functioning.*" [1]

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[1] See Petition, p. 2: Question Presented

To appraise this issue it suffices merely to read the weird saga, summarized on pages 2 to 8 of the Petition, of counsel's rule infractions, late filings, unintelligible explanations, irrelevant arguments, and inability (confessed by letter to the Clerk) to understand how to comply with the Court's printed rules. These errors, we submit, were so extreme that they could not be accepted by any justice of the peace court, let alone a United States Court of Appeals, as normal behaviour of a member in good standing of the bar of the Court.

Respondent brushes aside the tragic recital of errors, delays, and confusions by saying "we do not think it was such as to warrant an inference of mental incapacity." That, of course, is not the issue, but rather whether the performance was, on its face, so persistently bizarre for a member of the bar of a Federal Court of Appeals as to be explicable only on the ground of *some* form of abnormality.[2]

The alternative, of course, would have been for new counsel to charge prior counsel simply with utter incompetence, even though he was a member in good standing of the bar of the Court. But this would have been not only a slight on the Court but also cruelly callous in view of the record evidence of prior counsel's serious illness

[2] Rather than squarely meet the issue of the egregious behavior of counsel of record, Respondent seems to suggest that regardless of how incompetent appeal counsel may have been, petitioner had "the benefit of professional advice from two other Washington law firms, as well as its Chicago counsel." But this is not so. When petitioner approached other counsel on September 8, 1965, such counsel advised "that at that stage of the case the then counsel of record was the person who could most readily straighten out the procedural situation . . ." Certainly petitioner should not be penalized for following this advice and returning with his counsel of record to confer with the Clerk on September 9, 1965, with the expectation that counsel would, as he assured the Clerk, take the steps outlined by the Clerk to avoid dismissal of the appeal. (Tr. 117).

occurring precisely at the time the appeal was taken.[3] For, in either case, the legal conclusion on this record would have to be the same, that counsel's representation was "of such a low caliber as to amount to no representation."[4]

Under these circumstances we are confident that the Court below would have reinstated the appeal, had it not felt restrained by the majority opinion in *Link*. Presumably it shared the Respondent's view that *Link* was controlling, short only of actual psychiatric proof of mental incapacity. Such an interpretation of *Link*, while we think unnecessary,[5] is perhaps understandable in view of the very broad dictum laid down by the majority and which Respondent had urged on the Court in opposing reinstatement of the appeal.[6]

Second, even if the Court disagrees that the errors here *per se* evidence such abnormality (or utter incompetence) as to make counsel's representation "of such low caliber as to amount to no representation at all," certiorari should be granted to at least clarify, if not overrule, the *Link* doctrine.

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[3] Tr. 21, 154, quoted in Petition pp 3, 7.

[4] See discussion in Petition pp 14, 15, 16.

[5] See discussion in Petition, pp 14, 15.

[6] Tr. 132 where Respondent quoted to the Court only the following excerpt from *Link* v. *Wabash Railroad Company*, 370 U.S. 632, 633-634.

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' Smith v. Ayer, 101 U.S. 320, 326, 25 L.Ed. 955." (Footnote omitted).

For, we doubt that even the majority intended that a client should be penalized for errors of counsel as egregious and bizarre as those shown by the present record. (See discussion in Petition, pp. 14, 15). In addition, there appear to be strong arguments, both in legal theory and judicial policy, for the minority view in *Link*. (See discussion in Petition, p. 16-20) Decided by a bare 4 to 3 vote of the Court, *Link* involves an issue sufficiently important to the administration of justice, in both the appellate and nisi prius courts, to warrant reconsideration and, at the very least, clarification by a full court.

Respectfuly submitted,

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May 1966